

Subject: Waring letter to LBC re Homer annexation remand

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From: Kevin Waring <kwaring@alaska.net>

To: Dan Bockhorst <dan_bockhorst@dced.state.ak.us>

CC: Jennie Morrison <jennie_morrison@dced.state.ak.us>

Dan: attached file contains my comments to the Commission regarding the Homer annexation remand.

Kevin



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2020 Banbury Circle
Anchorage, AK 99504
June 24, 2004

Mr. Darroll Hargraves
Chairman, Local Boundary Commission
550 West 7th Avenue, Suite 1770
Anchorage, AK 99501-3510

Dear Chairman Hargraves:

I want to commend the Local Boundary Commission for inviting emancipated commissioners to comment on the remanded City of Homer annexation proceeding. Given the circumstances of this proceeding – none of the commissioners who will consider the remand participated in the Commission's original decision – I am glad to offer my personal thoughts on the matter to the Commission.

Judge Rindner remanded the City of Homer annexation decision to the Commission with instructions to consider the impacts annexation might have on the remnant KESA and determine whether, given those impacts, the annexation was in the best interests of the state.

First, I will address Judge Rindner's remand instructions, deferring discussion of the broader legal and policy issues inherent in his decision.

Facts in record at the time of the original decision gave the Commission ample reasons, had it thought reasons were needed, to conclude that the annexation was in the best interests of the state regardless of impacts on the remnant KESA.

Among other facts in the original record:

1. The Commission found there was a need for city services in the annexed territory.
2. The Commission found that without the annexation, "both the City and the area approved for annexation could be negatively affected because, absent planning, development detrimental to both areas will occur."
3. The Commission found that the City of Homer was best able to provide needed services to the annexed territory.

4. The population in the City of Homer and in the annexed territory greatly exceeded the population of the remnant KESA.
5. The Alaska Constitution elevates general purpose municipal governments over service areas. Boroughs may not establish new service areas where the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city. Service areas are subordinate to the municipalities that establish them. Service areas lack autonomous authority to levy taxes, charges, or assessments.
6. The City of Homer was a general purpose city municipality with a long history of providing a variety of city services. The KESA was a recently formed limited purpose service area.
7. Since its inception, the KESA contracted with the City of Homer to deliver fire and emergency services to the service area. The KESA did not develop an operational capacity to deliver its services.
8. After annexation as before, the KESA would have several practicable options for delivery of its services.¹
9. The Kenai Peninsula Borough, the municipality responsible for the KESA's creation and ultimately responsible for its financial condition, concurred in the transition plan, without claim that the annexation would impair the viability of the remnant KESA.

In sum, the original record supports a determination that the benefits of annexation to residents of the City of Homer and the annexed territory outweighed any adverse impacts on the remnant KESA, and that annexation is in "the best interests of the state" as required by AS 29.06.040(a) and 3 AAC 110.135, and as further specified in 3 AAC 110.980. I urge the Commission to affirm its earlier decision to approve the annexation.²

Next, the legal premises underlying Judge Rindner's decision to remand are unsettling in several respects. As best I can tell, the ruling that the Commission **must** explicitly consider annexation impacts on a remnant service area as part of its determination of the "best interests of the state" has no constitutional, statutory, or regulatory foundation. Further, it appears to run counter to a previous Alaska Supreme Court decision requiring the Commission to ground its decisions on regulatory provisions. This matters greatly on both counts.

First, Judge Rindner's ruling will have implications for many proposed city annexations. City annexation proposals frequently impinge on adjacent service

¹ In fact, I believe the KESA has continued its pre-annexation arrangement to contract with the City of Homer for actual delivery of services.

² In my mind, the legality of the KESA was not an issue. At the time the Commission heard the petition, the KESA's formation was unchallenged and its de facto existence perhaps unchallengeable.

area boundaries. Recent examples include annexation proposals by the cities of Ketchikan, Kodiak, and Haines.³

Second, Judge Rindner's ruling that the Commission **must** consider a factor that is not codified in law or regulation is inventive.⁴ It effectively nullifies the protection that established standards afford to all parties in a proceeding. It exposes the Commission and others to unforeseeable second-guessing. If left unchallenged, it invites mischief in future city annexation proceedings.

Judge Rinder cites Keane v. Local Boundary Commission as a basis for his remand. In Keane, the Alaska Supreme Court properly cited the Commission's failure to satisfy a specific statutory provision (AS 29.05.021(b)) in remanding the Pilot Point incorporation petition. There is a critical distinction between Keane and the present case. The Keane remand was based on the Commission's omission to address a specific statutory requirement. No law or regulation requires the Commission to address the impacts of annexation on a service area or remnant service area.

Review of relevant statutes and regulations indicates that this lack is considered and purposeful, and reflects a consistent public policy posture on the relative status of city and borough municipalities and service areas. It is noteworthy that:

1. The Alaska Constitution established a local boundary commission to consider any proposed local government (i.e., city or borough) boundary change, but not service area boundary changes. Service area boundary changes were not deemed a matter of statewide concern comparable to municipal boundary changes and were delegated to municipal governments.
2. AS 29.06.040 establishes a statutory procedure for Commission consideration of municipal boundary changes. The legislature has not adopted comparable statutory procedures governing service area boundary changes.
3. AS 44.33.812(a)(2) requires the Commission to adopt regulatory standards and procedures for **municipal** annexation and detachment. The legislature has not adopted comparable statutory requirement for service area boundary changes.
4. 3 AAC 110 establishes regulatory standards for annexations to cities and boroughs. The Commission has not adopted comparable standards for annexations to service areas.

³ The Commission's decision statements in those cases offer a principled and consistent analysis of issues stemming from city annexation of service areas.

⁴ The Commission's **discretionary** authority to consider any facts it deems relevant is not here in question. This discretionary authority is implied by AS 29.06.040 which states that the commission **may** (not must) accept a proposed annexation that satisfies applicable statutory and regulatory standards.

5. 3 AAC 110 establishes regulatory standards for detachments from cities and boroughs. These standards authorize the Commission to consider impacts on the remnant city (3 AAC 110.260(a)(2)) and the remnant borough (3 AAC 110.260(a)(2)). The Commission has not adopted comparable regulatory standards for detachments from service areas or impacts on remnant service areas.

Clearly, the Alaska Constitution and the Alaska legislature, and the Commission following their lead, have a heightened regard for municipalities compared to their service areas.

Judge Rindner's remand decision is problematic in light of two other Alaska Supreme Court decisions.

In U.S. Smelting, Refining and Mining Company v. Local Boundary Commission, the Alaska Supreme Court ruled:

Since under AS 44.19.260(a) the legislature required the commission to develop standards in order to recommend boundary changes, and the commission had not developed regulations prior to the Nome annexation proceedings, we hold that the commission lacked the power to recommend the Nome boundary changes in question. To do otherwise would be to condone the commission's nonobservance of a valid legislative prerequisite to the exercise of the commission's discretion in matters of local boundary changes.

In the present case, the Commission has adopted regulations. The regulations do not require the Commission to consider annexation impacts on remnant service areas. There is no allegation that the Commission has failed to adopt necessary regulations. Judge Rindner's ruling seemingly stands the Alaska Supreme Court's ruling in U.S. Smelting on its head by requiring the commission to address an extra-regulatory standard.

Also puzzling is why Judge Rindner applied "independent judgment" rather than the "reasonable basis test" to the issue of whether the Commission properly considered impacts on the KESA, especially given his cite of and quotes from Mobil Oil Corp. v. Local Boundary Commission. Another telling passage from that decision seems pertinent here:

Appellants attack the scope of the superior court's review of the Commission's action, contending that the court accorded undue deference to the Commission when it declined to undertake independent interpretation of the standards for incorporation. We disagree. Recent cases have established that where administrative action involves formulation of fundamental policy, the appropriate

standard on review is whether the agency action has a reasonable basis.

Arguably, Judge Rindner did interpose his independent interpretation of the regulatory standard on the “best interests of the state” to justify the remand, rather than abiding by the “reasonable basis test.”

I understand the State chose not to appeal Judge Rindner’s decision. Even so, if the Commission affirms its earlier decision, I strongly urge the Commission to take exception now to Judge Rindner’s ruling that the Commission **must** consider an extra-statutory or extra-regulatory factor – in this case, the impacts on a remnant service area – in its application of the statutes and regulations.

Very truly yours,

Kevin Waring